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(1)

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 482

EDWARD JORDAN DIMOCK, AS SUBSTITUTED EXECUTOR
OF THE LAST WILL AND TESTAMENT OF HENRY C.
FOLGER, DECEASED, AND AS EXECUTOR OF THE LAST
WILL AND TESTAMENT OF EMILY C. J. FOLGER,
DECEASED, PETITIONER

v.

WALTER C. CORWIN, LATE COLLECTOR OF INTERNAL
REVENUE, FIRST DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court for the Eastern District of New York (R. 112-129) is reported in 19 F. Supp. 56. The opinion of the Circuit Court of Appeals (R. 154-163) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 17, 1938 (R. 164). The

petition for a writ of certiorari was filed November 22, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the full value of property held by the decedent and his wife as joint tenants, or only one-half thereof, may be included in the gross estate of the decedent as a measure for Federal estate tax where the decedent furnished the entire consideration for the property and the joint tenancy was created prior to the passage of the first Federal estate tax Act in 1916.

2. Whether the value of property given the surviving joint tenant by the decedent and contributed by her to the joint tenancy prior to the passage of the first Federal estate tax Act may be included in the decedent's gross estate where no consideration in money or money's worth was paid the decedent for such property.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 9-13.

STATEMENT

On June 11, 1930, Henry C. Folger died a resident of New York, his wife, Emily C. J. Folger, surviving him (R. 74). Mr. Folger was a New York lawyer who had been chairman of the board

of directors of the Standard Oil Company of New York (R. 74, 76).

At the time of his death, Mr. Folger, with Mrs. Folger, owned, as joint tenants, shares of stock in a number of Standard Oil companies (R. 86, 87). The joint tenancies in these stocks were created prior to September 9, 1916, the effective date of the first Federal estate tax Act (R. 87).

In 1912 Mr. Folger began giving Mrs. Folger varying amounts of stock in the Standard Oil companies. Prior to May 29, 1912, he gave her 251 shares of capital stock of the Standard Oil Company of New York, and prior to March 10, 1914, he gave her 656½ shares of the Standard Oil Company (California) (R. 90). The shares of both of these companies were registered in her individual name on the books of the corporations (R. 45).

No consideration in money or money's worth was paid to the decedent, Henry C. Folger, for said stocks by Emily C. J. Folger (R. 47).

In 1914 Mr. Folger began establishing joint accounts with Mrs. Folger in the stocks of the Standard Oil companies, registering the stocks in their joint names (R. 86, 87). Mrs. Folger transferred to these accounts some of the shares Mr. Folger had given her one or more years before. On February 9, 1915, she transferred ½ share of the Standard Oil Company (California) into a joint account (R. 91). She transferred 250 of the 251 shares of the Standard Oil Company of New York into their

joint names on February 9, 1916 (R. 90). On February 24, 1916, she transferred into their joint names the remaining 656 shares of the Standard Oil Company (California) (R. 91).

The shares transferred by Mrs. Folger to the joint names had a value as of the date of the death of Mr. Folger of \$846,772.15 (R. 90, 91), and those transferred by Mr. Folger \$2,760,247.04, making a total death value of the shares transferred by both of \$3,607,019.19 (R. 89).

Only one-half of the value of the jointly held property was returned by the estate for taxation. The Commissioner of Internal Revenue assessed additional estate taxes based upon the inclusion of the full value of such property.

The estate paid the assessment, filed a timely claim for refund of the additional taxes paid and upon its rejection brought this suit for recovery (R. 92-94).

The District Court concluded as a matter of law that the Commissioner (a) properly determined that the full value of the property held in the joint accounts should be included in the gross and net estates of the decedent for estate tax purposes, and (b) properly determined that no part of the value of the joint estates, representing property transferred thereto by Mrs. Folger, should be excluded from the gross and net estates (R. 98, 99). The Circuit Court of Appeals for the Second Circuit

affirmed the judgment of the District Court (R. 164).

ARGUMENT

1. Petitioner is correct in saying that the instant decision is in conflict with *Jacobs v. United States*, 97 F. (2d) 784 (C. C. A. 7th), certiorari granted, November 7, 1938 (No. 391). The Government, therefore, does not oppose the granting of a writ of certiorari, but suggests that it be limited to the first question presented by the petitioner. In this connection, however, we submit that the present decision is clearly correct under principles which this Court has already enunciated.¹ The *Jacobs* case is a departure from these principles.

2. The second question presented by the petition does not merit review. It is a stipulated fact that Mrs. Folger received the stock from Mr. Folger without giving him any consideration in money or money's worth (R. 47). The question is not substantial and is unlikely to arise in future cases, and there is no conflict.

Petitioner relies upon an exemption—which must be strictly construed in favor of the Government. The question is stated by petitioner to be whether the exemption is prospective only, or

¹ *Tyler v. United States*, 281 U. S. 497; *Phillips v. Dime Trust & S. D. Co.*, 284 U. S. 160; *Third National Bank & T. Co. v. White*, 287 U. S. 577; *Foster v. Commissioner*, 303 U. S. 618; *Helvering v. Bowers*, 303 U. S. 618.

whether it is retroactive back beyond the date when it was written into the law.

We think the statute as it stands does not accomplish a retroactive result. The tax is not laid upon the prior gift to the survivor, but upon the event which occurs at death and which accomplishes or completes a transfer to the survivor of what was first the decedent's property. It is wholly consistent with the purpose of such a tax to include every part of the joint property which ever belonged to the decedent alone and that is the test which this statute prescribes.

Petitioner's contention that the Act is prospective only is premised upon his insertion of words in the statute, "*after the passage of this act*" (Pet. p. 7), which were not inserted by Congress. On the contrary Congress has provided, and this Court has applied, subdivision (h) of Section 302, which specifically makes subdivision (e) applicable to any time prior to the enactment of the Act. *Gwinn v. Commissioner*, 287 U. S. 224.

The first *proviso* of Section 302 (e) reads as follows:

Provided, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only

such part of the value of such property as is proportionate to the consideration furnished by such other person: * * *

This limited express exemption indicates that Congress did not intend the additional implied exemption sought by the petitioner. *Moore Ice Cream Co. v. Rose*, 289 U. S. 373, 377. If Congress had not intended the exemption to apply only to property *never* received from the decedent for less than an adequate consideration (*infra*, p. 9), whether before or after the effective date of the Act, it would have said so.

Petitioner's argument to support his theory that the Act in this respect is prospective only is without weight, because the decisions of this Court upon which the argument is based were rendered with respect to statutes that do not include such a clear expression of Congressional intent as appears in subdivisions (e) and (h) of Section 302 of the Revenue Act of 1926. The difference between this Court's decision in *Knox v. McElligott*, 258 U. S. 546, and its later decisions, beginning with *Tyler v. United States*, *supra*, clearly illustrates this fact.

Congress has the power to include such prior gifts and has exercised it in plain and compelling language. There is no reason for reading into the statute an exception which Congress has nowhere indicated.

CONCLUSION

If the petition for a writ of certiorari is granted,
it should be limited to question "1" as stated above.

Respectfully submitted.

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✓ JAMES W. MORRIS,
Assistant Attorney General.

✓ SEWALL KEY,

✓ J. LOUIS MONARCH,

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✓ EDWARD J. ENNIS,

Attorney.

DECEMBER 1938.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253, 304:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent

of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

Revenue Act of 1926, c. 27, 44 Stat. 9, 70:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the considera-

tion with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

Treasury Regulations 70, promulgated pursuant to Section 1101 of the Revenue Act of 1926 (1926 ed.):

ART. 22. *Property held jointly or as tenants by the entirety.*—The foregoing provisions of the statute extend only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916. The statute specifically reaches property

held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. The statute applies to all classes of property, whether real or personal, where the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for the purposes of administration. It does not include property held by the decedent and any other person or persons as tenants in common.

Treasury Regulations 80, promulgated pursuant to Section 1101 of the Revenue Act of 1926, as amended (1934 ed.):

ART. 22. Property held jointly or as tenants by the entirety.—The foregoing provisions of the statute extend to joint ownerships wherein the right of survivorship exists, regardless of when such ownerships were created. The statute specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited, or acquired it by gift, bequest,

devise, or inheritance. This section of the statute applies to all classes of property, whether real or personal, in the case the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for purposes of administration. It has no reference to property held by the decedent and any other person or persons as tenants in common.